No. 21179

United States
Court of Appeals
for the Ninth Circuit

DEWEY EARL LAKE, JR.

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

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District of Oregon

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COUNTER-STATEMENT OF THE CASE

On September 27, 1965, appellant Lake and one Harold Goutermont were indicted for wilfully transporting and causing to be transported in interstate commerce a stolen Ingersoll-Rand Air Compressor from Portland, Oregon to Sparks, Nevada, in violation of 18 U.S.C., Section 2314 (TR. 1). [1] After a jury trial before the Honorable John F. Kilkenny, Lake and Goutermont were each found guilty. Appellant Lake was sentenced to three years in the federal penitentiary to be confined for a period of four

[1] References to the transcript of record of the District Court Clerk will be designated "TR". References to the two-volume trial transcript will be designated "R".

months, and placed on probation for the remainder of the suspended sentence. The defendant Goutermont has not appealed the judgment of conviction, and the present appeal involves solely that of appellent Lake.

The evidence to support the verdict of guilt may be briefly summarized as follows:

On April 30, 1965, an Ingersoll-Rand Air Compressor, Model D.L. 600, Serial No. 34949 (having a value of over $20,000) was received as part of a shipment from New York by the Loggers and Contractors Machinery Company in Portland (R. 168; Govt. Ex. 10). The compressor was kept on the open storage lot of the Company and was at that location on May 14, 1965 when an inventory was taken (R. 170; Govt. Ex. 11). When the next inventory was taken in mid-June, 1965, the compressor was found missing (R. 171-172, 185-188; Govt. Ex. 12).

The evidence showed that, on about May 17, 1965, appellant Lake hired a truck driver, Lee Grimm, to drive a truck from Portland to Klamath Falls. Lake instructed Grimm to rent a truck from Hertz Truck Rental. Grimm, using Lake's credit card, rented a

16 foot Ford Van on May 17, 1965, but returned the truck the following day after being told by Lake that "The load wasn't ready to go." (R. 19-20; Govt. Ex. 1). About a week later, on May 23, 1965, Grimm again rented a truck from Hertz with Lake and Goutermont present, and made a $200.00 cash down payment which he received from Lake (R. 20-21; Govt. Ex. 2). This truck—which Grimm was hired by Lake to drive to Reno, Nevada—was an 18 foot Ford Van, and was driven by Grimm to the home in Portland of one Linda Moran (R. 22). The stolen air compressor had been brought to Miss Moran's garage, and stored therein, by the defendant Goutermont some time before, and Lake, Goutermont and Grimm loaded the compressor onto the truck (R. 22, 81-82). The parties agreed to meet in Reno, with Grimm and Lake to drive in the truck, and Goutermont and Miss Moran to drive in the latter's pickup truck. [2] Upon arriving in Reno,

[2]Grimm, who was to receive $200.00 from appellant Lake for driving the truck, was instructed by Lake as to the route to take to Reno, viz: to Bend, Oregon, thence to Burns, Oregon, and from Burns down through Winnemucca, Nevada and into Reno (R. 24; Govt. Ex. 7). Moran and Goutermont followed a different route, viz: over Mt. Hood, through Madras, Oregon, to Lakeview, Oregon, and through Alturas, California to Reno (R. 85-86; Govt. Ex. 7). At the trial, the Government took the position that the route taken by the parties had significance in that Lake and Goutermont were attempting to conceal the stolen vehicle from the authorities. In this regard, the Government in-

the compressor was taken by Grimm and Lake to the home of one Donald Dugger in Sparks, Nevada, and placed in his garage (R. 139). Dugger, by prearrangement with Goutermont, was to sell the air compressor, and Lake and Goutermont informed Dugger that they wanted $15,000 for the compressor, anything over that amount to go to Dugger (R. 139-140). After negotiating with Dugger, Lake and Goutermont left the compressor in Dugger's garage, and returned to Portland (R. 144). Shortly thereafter, the air compressor was recovered by the F.B.I., and Lake and Goutermont were arrested and charged with the theft of this machine (R. 153-154). After his arrest, Lake called Grimm and told Grimm to "Keep (his) mouth shut" and "to say that Mr. Goutermont had hired (Grimm) to drive this truck" (R. 30).

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troduced evidence to show that Lake had instructed Grimm to take the longer route from Portland to Reno through Nevada rather than through California (R. 25); that the trip through California required a stop at the border checking station at Alturas, as Miss Moran testified (R. 86); that the authorities at the border checking station looked into vehicles stopped there to determine if fruit or produce are carried therein (R. 86); and that no such inspection was made at the Nevada checkpoint in McDermott, thereby minimizing the risk of discovery (R. 26-27).

I.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

Appellant claims (BR. 7-8, 20-21), that the Government's proof was insufficient in proving either that the air compressor was, in fact, stolen or that appellant had participated in the crime. In making this argument, we respectfully submit that appellant does no more than assert that the jury did not accept his version of the case. The evidence, viewed in the light most favorable to the Government, was amply sufficient to support the verdict. As shown by the statement above, appellant twice hired Grimm to drive a truck to transport the equipment, and provided the money to rent the truck; caused the return of the truck on the first rental since "the load wasn't ready"; directed Grimm to take the Nevada rather than the California route to Reno with a view to facilitating the concealment of the compressor; joined with Goutermont in discussing the sale of the compressor; [3] and finally, after his

[3]We note that appellant's guilty participation in the venture and his obvious knowledge that the air compressor was stolen is further shown by the palpably low amount of $15,000 which appellant and Goutermont were willing to accept. The air compressor was purchased new by Loggers and Contractors Machinery Co. a few months before at a twenty per cent discount wholesale cost of over $18,000 (R. 9-10).

arrest, warned Grimm "to keep his mouth shut" and to say that Goutermont had hired him to drive the vehicle. See statement, *supra*.

Nor was the force of the Goverment's proof at all diminished by appellant's defense. To counter the Government's case against him, appellant denied that he had hired Grimm to drive the truck (R. 295, 302); denied that he had helped Grimm and Goutermont load the compressor into the truck (R. 286-287); stated that his conversation with Grimm prior to leaving Portland for Reno revealed to him only "that some kind of machinery was being transported" (R. 287, 334); denied that he had any conversation with Dugger concerning the price to be gotten on the future sale of the compressor (R. 292); stated that the first time he learned that the equipment was an air compressor was when it was unloaded in Reno (R. 343); and declared that his purpose in making the trip was to do some gambling and to secure repayment of monies which he had loaned to Grimm and Goutermont (R. 285).

On the basis of this testimony, which was completely contrary to that of Government witnesses Grimm and Dugger, the jury could (and obviously did) readily conclude that appellant had fabricated

his testimony in an effort to blame the co-defendant Goutermont [4] and to escape criminal liability.

Finally, there is no substance whatever to appellant's assertion that the Government never proved that the compressor was in fact a stolen piece of equipment. Mr. Flatt, the office manager for Loggers and Contractors Machinery Company, testified that the air compressor in question was received in Portland on April 30, 1965, and stored in the company lot (R. 168; Govt. Ex. 10); that, on May 14, 1965, an inventory was taken and the compressor was still in the inventory at that time (R. 170; Govt. Ex. 11); that, when the next inventory was taken on about June 14, 1965, the compressor was found missing from the lot (R. 171-172, 185-188; Govt. Ex. 12); as testified to by Agent Stone of the Federal Bureau of Investigation, this same air compressor was recovered by the F.B.I. in Sparks, Nevada, at the home of Donald Dugger to which it had been brought by the co-defendants Goutermont and Lake (R. 139, 153-154); and that, on the following day, the compressor was turned over to the

[4]We note that the co-defendant Goutermont, contrary to the testimony of appellant Lake, stated that his first contact with the air compressor was through defendant Lake who stated that "he had a compressor and wanted to know if I knew where we could sell it." (R. 361).

MacLeod Trucking Co., and returned by them to the rightful owners, Loggers and Contractors Machinery Company in Portland (R. 154, 195-198; Govt. Exs. 14-15).

In short, the record reveals beyond doubt that the air compressor was stolen, and appellant's argument to the contrary (BR. 7) is without support in the evidence.

II.

THERE WAS NO PREJUDICIAL ERROR IN THE PROCEEDINGS BELOW.

A. The cross-examination of the witness Johnston.

There is no merit to appellant's complaint (BR. 9-10) that he was prejudiced by the allegedly improper cross-examination of one of his witnesses, Loretta Johnston. On direct examination, Mrs. Johnston had testified that Lake had loaned money to Grimm and Goutermont and that he was accompanying them and the equipment to Reno only for the purpose of insuring the repayment of these loans after the machine was sold (R. 220). On cross examination of Mrs. Johnston by counsel for the de-

fendant Goutermont, [5] Mrs. Johnston was questioned for the purpose of showing her partiality towards the defendant Lake and her bias against Government witness Grimm who had implicated Lake in the offense charged (R. 235, 240). It was in this context that defense counsel for Goutermont asked the allegedly objectionable question concerning the stolen property in her home at the time of the break-up of her earlier marriage to Mr. Angel (R. 241). Whether this question was asked to impeach Mrs. Johnston's credibility by prior acts of misconduct or to show an eventual tie-in with Mr. Lake in a similar type of crime to that charged in the instant case is not revealed by the record since the trial court promptly sustained the objection to the question and instructed the jury to disregard it (R. 242). This was a minor incident in the trial, the point was not mentioned again, and the immediate corrective action of the court removed any possibility of prejudice.

B. The Closing Argument of the Prosecuting Attorney.

Appellant asserts (BR. 11-12) that his constitu-

[5] In his brief, appellant Lake mistakenly states (BR. 9) that the cross examination was by Government counsel.

tional privilege against self-incrimination was violated in the closing argument of the prosecuting attorney as follows (R. 399-400):

> "MR. SEPENUK: (continuing) There is so much other evidence in the record. We don't need this man Lake's testimony to show that Mr. Goutermont is guilty of this offense. We don't need their testimony, because the testimony of these other witnesses proves beyond any doubt, we suggest to you, ladies and gentlemen, that this was a criminal partnership, that the two of them were in here arm and arm; and that this shocking display that you have seen here this afternoon of each man telling diametrically opposed stories, that they are doing the same thing they did after they were arrested. Each is trying to put the blame on the other one, when in fact the blame is joint."

The comments presumably objected to by appellant is the reference of the prosecuting attorney to certain statements made by him after arrest. Appellant makes the same erroneous assumption on appeal as he did at trial, viz: that the prosecuting attorney was referring to post-arrest statements which may have been made to agents of the Federal Bureau of Investigation. To the contrary, as was explained by the prosecuting attorney in a colloquy with the trial court (R. 401-406), the comment in closing argument had no reference to anything said by appellant Lake to federal officers. In fact, no

such admissions or statements were elicited at the trial in view of the trial court's ruling that the voluntariness of such statements, if any, had not been affirmatively established by the Government in a pre-trial hearing (R. 345-346; 401-406). Accordingly, the comment by the prosecuting attorney, as was noted by him in the court below (R. 405-406), was directed to Lake's post-arrest statement to Government witness Grimm when Lake warned Grimm to "Keep (his) mouth shut" and "to say that Mr. Goutermont had hired (Grimm) to drive this truck." (R. 30) This was certainly fair argument by the prosecuting attorney, was solidly based in the evidence, and appellant has no cause to complain.

C. The testimony of the witness Dugger.

At the trial, a Government witness, Donald Dugger, testified on direct examination that he was to sell the compressor for Lake and Goutermont and receive a certain percentage of the proceeds (R. 139-140). After so testifying, the following questions and answers took place on direct examination by the Government attorney (R. 140-144):

> "Q Did you specifically ask Mr. Goutermont about where he had acquired this compressor?
>
> "A Yes, I did, but he didn't say.

"Q Did you ask him whether or not it was stolen?

"A Yes, I did.

"Q And what did he say?

"A He said 'no'.

"Q Is that your recollection now, that he said 'no'?

"A Yes.

"Q Would it refresh your recollection at all if I reminded ——

"MR. HOWLETT: Objection, your Honor.

"THE COURT: Overruled.

"Q (By Mr. Sepenuk) Do you recall making a statement on this point ——

"MR. HERNDON: For the purpose of this record, I want to join in the objection.

"THE COURT: All right. You have joined in the objection, and it is overruled.

"Q (By Mr. Sepenuk) Mr. Duggar, do you recall giving a statement to Special Agent Dempsey and Special Agent Stone of the Federal Bureau of Investigation?

"A Yes.

"Q And have you recently read this statement?

"A Yes. Yesterday.

"Q Right. And is this statement true? The statement that you read.

"A Yes.

"Q Would you mind just looking at it and see if

that refreshes your recollection as to what Mr. Goutermont mentioned to you about the compressor?

* * * * * *

"THE COURT: Now, read that carefully before you make any remarks.

"THE WITNESS: It says—it wouldn't say—

"THE COURT: All right. Now, does that refresh your recollection on anything?

"THE WITNESS: Yeah, Uh-huh.

"THE COURT: All right. How does it refresh it?

"THE WITNESS: How does it what?

"THE COURT: How does it refresh your recollection?

"THE WITNESS: Well he wouldn't say yes or no.

"THE COURT: All right. That is about the stolen property?

"THE WITNESS: Yes, that's right.

"Q (By Mr. Sepenuk) He wouldn't say yes or no; is that correct?

"A Yes, that's right."

At a recess following Dugger's testimony, the Court rejected the objections of defense counsel to this testimony as follows (R. 162):

"THE COURT: We have a couple of matters

> here. Now, on the question of impeachment of the Government's own witness, I will state this for the record: That it was obvious to me that the answer of the witness was a complete surprise to the Government, and that is why I permitted the witness to refresh his memory. So I note your objection. The objection is overruled, and if you have a motion to strike, the motion to strike will be denied."

Appellant claims (BR. 13) that the trial court's holding in this regard violated the general rule that "a party cannot impeach a witness whom he had introduced either in a civil action or in a criminal case where such party is not prejudiced by the testimony because of entrapment, hostility or surprise. 98 C.J.S. 356 & 477." We submit that the District Court's ruling was consistent with this general proposition in that, although no specific claim of surprise was made by Government counsel, the trial court readily observed that the prosecuting attorney was in fact surprised by the answer (R. 162). This Court has noted that the "power to permit impeachment of one's own witnesses lies peculiarly and properly within the discretion of trial judges who can closely observe the witness' behavior on the stand." *Stevens v. United States,* 256 F.2d 619, 622 In the instant case, the witness Dugger had told the prosecuting attorney only the day before he testi-

fied that the matters contained in the statement he gave to the F.B.I. were true, which was reaffirmed by Dugger when he testified (R. 141, 143). Accordingly, the present case is unlike the situation in *Bushaw* v. *United States,* 355 F.2d 477, 480-481 (C.A. 9), where the impeached witness had repudiated her statement prior to trial and there was no legitimate ground for the Government to claim surprise.

Moreover, we note that the prosecuting attorney in the instant case attempted to use the prior statement, not for purposes of impeachment, but in order to refresh the recollection of the witness and to note the apparently inconsistent statements. We respectfully suggest that such a procedure is entirely proper, and supported by respectable and well reasoned authorities. *Di Carlo* v. *United States,* 6 F.2d 364, 366 (C.A. 2—opinion by Judge Learned Hand); *United States v. Allied Stevedoring Co.,* 241 F.2d 925, 932-933 (C.A. 2); *United States* v. *Kahaner,* 317 F.2d 459, 474 (C.A. 2); *United States* v. *De Sisto,* 329 F.2d 929, 933 (C.A. 2); Compare *Stevens* v. *United States, supra,* 256 F.2d at pp. 622-623.

In any event, whether the matter be labeled im-

peachment or refreshment of recollection, appellant has shown no abuse of discretion under the circumstances presented here.

D. The giving of the "Allen" Instruction by the District Court.

After the jury had deliberated for almost one day, the District Court gave the well established supplemental instruction where jurors fail seasonably to agree (R. 429-438). This so-called "Allen" charge, based on the Supreme Court's decision in *Allen* v. *United States,* 164 U.S. 492, 501-502, has been approved on numerous occasions in this and other circuits. See Mathes and Devitt, *Federal Jury Practice and Instructions,* Section 15.16 (and cases cited therein). The propriety of giving this instruction was within the discretion of the District Court, and was entirely proper in this case.

E. The District Court's Instruction Relating to the Inferences to be drawn from Possession of Stolen Property.

Appellant complains (BR. 14-17) that the District Court erred in instructing the jury it could infer from possession of property recently stolen that the defendant knew that it was stolen if such possession was not satisfactorily explained (R.411). This charge,

which has long been judicially sanctioned in this Circuit (*Corey* v. *United States,* 305 F.2d 23), "has its genesis in human experience" and "is not a rule conveniently concocted by judges to fill gaps in the proof." *Morandy* v. *United States,* 170 F.2d 5. The charge was clearly correct.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

SIDNEY I. LEZAK
United States Attorney
District of Oregon

NORMAN SEPENUK
Assistant United States Attorney

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Date: day of December, 1966.

NORMAN SEPENUK
Assistant United States Attorney